Affirmed 16-34

Judge Davis

Chief Justice Waite

submitted.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 416. ~~205~~ 35

THE UNITED STATES, APPELLANTS,

vs.

THOMAS W. KELLY, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 17, 1870.

Dec. 7, 1872

SUPREME COURT OF THE UNITED STATES.

No. 416.

THE UNITED STATES, APPELLANTS,

vs.

THOMAS W. KELLY, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

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1 United States Court of Claims.

THOMAS W. KELLEY
vs.
THE UNITED STATES. } 2977.

To the honorable the judges of the Court of Claims:

The petition of Thomas W. Kelley, of Detroit, in the State of Michigan, respectfully represents:

That on the 12th day of February, 1864, he enlisted as a private in Company D of the 19th Regiment United States Infantry, regulars, and was on that day duly mustered into the military service of the United States to serve three years.

That your petitioner served faithfully as a private in said regiment and company until the 3d day of October, 1865, when, having learned that his father and mother were seriously ill at their home in Detroit aforesaid, and after having applied to the proper officer for a furlough without success, he deserted and went to Detroit; said desertion occurred at Augusta, in the State of Georgia.

And he further says that, after remaining at his father's house for about six weeks, your petitioner voluntarily reported himself as a deserter to Colonel Hart, who was then engaged in the recruiting service at Detroit aforesaid, and was by him returned to his said regiment; that he was assigned to duty without trial, and never has been tried for his said offence.

That from the time of said return to the 20th day of April, 1867, your petitioner served faithfully as a private in said regiment, and fully made up to the United States the time lost during his desertion.

That, on the 20th day of April, 1867, your petitioner was honorably discharged from the military service of the United States, by reason of "expiration of term of enlistment."

That, by reason of the premises and of the joint resolution of
2 Congress, approved January 13, 1864, and of General Order No. 66, War Department, series of 1864, your petitioner became entitled to receive from the United States the sum of $400 as bounty money.

That, previous to his said desertion, your petitioner had received from the United States the sum of $175, part and parcel of said bounty money, and no more, and that since his said desertion the pay department of the United States, to whom he made application, has refused and still refuses to pay the unpaid balance of said bounty money, or any part thereof.

That your petitioner has always borne true allegiance to the Government of the United States, is a citizen thereof, and has never voluntarily aided, abetted, or given encouragement to the rebellion against said Government.

Your petitioner, therefore, claims that there is due him from the United States the sum of $225; the same being the unpaid balance of the $400 bounty provided by law; and for that amount he respectfully prays judgment.

CHIPMAN & HOSMER,
Claimant's Attorneys.

STATE OF MICHIGAN, *County of Wayne, ss:*

Thomas W. Kelley, of said county, being duly sworn, says that he is

the petitioner named in the above and foregoing petition, and that no assignment or transfer has been made of said claim, or any part thereof, or any interest therein, to any person whomsoever; and he further says that he is justly entitled to the amount in said petition claimed from the United States, after deducting all just credits and offsets.

THOMAS W. KELLEY.

Sworn and subscribed before me this 16th day of November, 1867.

[L. S.] CHARLES F. PELTIER,
Notary Public Wayne County, Michigan.

3 In the United States Court of Claims, December term, A. D. 1868.

THOMAS W. KELLY
vs.
THE UNITED STATES. } No. 2977.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of $225 00, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney General.

4 In the Court of Claims.

THOMAS W. KELLY
vs.
THE UNITED STATES. } No. 2977.

And now, to wit, 16th of May, A. D. 1870, the court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Thomas W. Kelly have and recover of and from the United States the sum of two hundred and twenty-five dollars, no cents, ($225 00.)

By the court.

A true copy of record.

5 In the Court of Claims, Dec. term, 1869.

THOMAS W. KELLY
vs.
THE UNITED STATES. } 2977.

From the judgment rendered in the above-entitled cause 16 May, 1870, in favor of the claimant, the defendants, by their Attorney General, on this 17th May, 1870, make application for and give notice of an ap-

peal to the Supreme Court of the United States; the judgment in this case affecting a class of cases and furnishing a precedent for the future action of an executive department in the adjustment of such class of cases.

THOMAS H. TALBOT,
Ass't Att'y Gen'l.

Filed in the clerk's office, 16 May, 1870.

I, Joseph Casey, Chief Justice of the Court of Claims of the United States, hereby certify that the decision of the above-entitled cause, will affect a class of cases & properly furnish a precedent for the future action of the executive departments in the adjustments of such class of cases.

JOSEPH CASEY, *Ch. Justice.*

Ordered, That the appeal as prayed in the case of Thomas W. Kelly vs. The United States, 2977, be allowed.
May 17, 1870.
By the court.

6 In the Court of Claims.

THOMAS W. KELLEY
vs.
THE UNITED STATES. } No. 2977.

1st. The claimant, Thomas W. Kelley, enlisted in the United States Army as a private soldier, February 12th, 1864, at Detroit, Michigan, to serve three years, and was assigned to Company D, Nineteenth United States Infantry. He served as a soldier until the 3rd day of October, 1865, when he deserted.

2nd. On the 19th day of April, 1866, Major General Reynolds, of the Army, then commanding the Military Department of Arkansas, issued the following order:

["Special Orders No. 76.—Extract.]

"HEADQUARTERS DEPARTMENT OF ARKANSAS,
"*Little Rock, Arkansas, April 19th,* 1866.

7 "4. Upon the recommendation of his regimental commander, Private Thomas W. Kelley, Company D, First Battalion, Nineteeth United States Infantry, charged with desertion, is hereby restored to duty without trial, with the condition that he make good the time lost by his desertion, viz, from October 3rd, 1865, to December 11th, 1865.

"By command of Major Gen'l J. J. Reynolds.
(Signed) "CHA'S E. HOWE,
"*Captain, Assistant Adjutant General.*"

3rd. Pursuant to the foregoing order the claimant was restored to duty without trial and made good the time lost by his desertion, viz., from October 3rd, 1865, to December 11th, 1865, by serving as a soldier during that period.

4th. The claimant completed the full term of his enlistment exclusive of the time lost by desertion, and was discharged by reason of the ex-

piration of his term of service at Fort Gibson, April 20th, 1867, and was furnished with a certificate by the mustering officer of the United
8 States military service at that point, in the usual form given to soldiers, when honorably discharged the service.

5th. Prior to the time of claimant's desertion, he had been paid one hundred and seventy-five dollars of the bounty of four hundred dollars promised him by the terms of his enlistment, but was paid no further sum on said bounty.

By the court.

9 In the Court of Claims.

THOMAS W. KELLY
vs.
THE UNITED STATES. } No. 2977.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the counsel for the defendants for the allowance of an appeal, as filed in the clerk's office 16 May A. D. 1870, and of the order of the court of 17 May, 1870, allowing the same; of the finding of facts, and conclusions of law on said facts, on which the court founded its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this seventeenth day of December, 1870.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 416. The United States, appellants, vs. Thomas W. Kelly. Court of Claims. Filed 17th December, 1870.

In the Supreme Court of the United States.

THE UNITED STATES, APPELLANT,

against

THOMAS W. KELLEY, APPELLEE.

No. 35.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Thomas W. Kelley, a citizen of Detroit, Michigan, enlisted as a private in company D of the 19th United States infantry, on the 12th day of February, 1864. By the law of the United States he became entitled, by virtue of his enlistment, to $400 bounty, payable in instalments as certain periods of his service should expire. While a soldier he deserted, and was afterwards restored to duty without trial, and made good the time of his desertion. He was paid $175, the amount of bounty money due at the time of desertion, but was refused payment of the balance of the $400 bounty provided by law. This suit was brought to recover that amount, to wit, $225. The Court of Claims gave judgment for the amount, from which the United States appealed.

Facts in the Case.

1st. Kelley enlisted at Detroit, Michigan, February 12, 1864, and was assigned to company D, 19th United States infantry. He served as a soldier until the 3d day of October, 1865, when he deserted. (See record, p. 3.)

2d. He returned to his company, and upon the recommendation of his regimental commanders, was restored to duty, without trial, by the commander of the department of Arkansas, on the condition that he make good the time lost by his desertion, to wit: from October 3, 1865, to December 11, 1865. (Record, p. 3.)

3d. Pursuant to the order of the department commander, Kelley was restored to duty without trial, and made good the time lost by his desertion by completing the full term of his enlistment, exclusive of the time so lost, and was discharged finally by reason of the expiration of his term of service, at Fort Gibson, April 20, 1867, and was given the usual honorable discharge of the service. (Record, pages 3 and 4.)

4th. Prior to his desertion Kelley had been paid $175 of the bounty of $400, promised by the terms of his enlistment, but was paid no further sum on said bounty. (Record, p. 4.)

Question.

Did Kelley by his desertion forfeit the unpaid balance of his bounty money? Although the Attorney General adheres to the opinion expressed by him officially to the Secretary of the Treasury favorable to the defendant, still we deem it due to the court to state the points in the case and the law governing it.

These points are, as we think—

1st. Does the law prohibit the payment of bounty money to a soldier who has deserted?

2d. Does desertion *per se* taint the *status* of a soldier,

so as to render him disqualified to receive bounty, which he otherwise could obtain?

3d. Was the desertion such a breach of contract as would relieve the Government from the fulfilment of its agreement?

I. Upon the first point, as to whether the law directly prohibits the payment of bounty money to deserters, we cite all the legislation upon this subject which we have been able to find: Act of March 3, 1791, Statutes at Large vol. 1, p. 224; vol. 9, p. 118, sec. 2; same vol., pages 184-5, sec. 5 and 16; same vol., p. 439, sec. 3; vol. 12, p. 181, sec. 5; same vol., p. 270, sec. 5; same vol., p. 326, sec. 3, which gave legal force to the President's proclamation of May 3, 1861, promising $100 bounty; same vol., p. 508, sec. 1; same vol., p. 598, secs. 3 and 4; same vol., p. 734, sec. 18; same vol., p. 744, sec. 7; same vol., p. 758; vol. 13, p. 400, joint resolution of January 13, 1864; vol. 402, p. 3, act February 24, 1864, requires bounty paid to minors discharged to be refunded, and deduct certain bounty of soldiers transferred to the navy from any prize money that may become due them, and pay $100 to loyal owners of slaves drafted; vol. 13, p. 403, act of March 3, 1864; vol. 13, p. 126, sec. 1, act of June 15, 1864; vol. 13, p. 144, sec. 3; vol. 13, p. 342, sec. 4, act of July 1, 1864; vol. 13, p. 478-8, sec. 3, 4, 11, act of March 3, 1865; vol. 14, p. 58, act June 6, 1866; sec. 14, same vol., p. 322, act of July 28, 1866; see also secs. 12 and 16.

The foregoing embrace all the laws providing for the payment of bounty money to United States soldiers. It will be observed that the act of July 22 and August 6, 1861, giving $100, the act of March 3, 1863, and the act of July 28, 1866, make an honorable discharge essential to the securing of bounty money. All the other laws are silent on that point, and make the payment of bounty conditional on the mere act of enlistment, or muster, or the length of

time the soldier served, or the fact of his being disabled by wounds or disease.

Kelley completed his enlistment and was honorably discharged, and complied with all the conditions which the law imposed in his case. The court will observe that in none of these laws is desertion mentioned. We say, therefore, upon every principle of law the statutes cannot be amended by adding another condition as to desertion. The law could, with as much propriety and legality, be amended by judicial legislation, so that Kelley must prove that he killed a certain number of rebels in battle, or that he never robbed a hen-roost while in service, or any other equally absurd condition.

In turning over these statutes, we find instances where bounty land and pensions are conferred upon soldiers, in which cases, deserters are mentioned as excluded from such benefits; for example, 2d Stats., p. 242; act of 28th September, 1850, 9 Stat., sec. 1, p. 520; 10 Stat., p. 701, sec. 1, act 3d of March, 1850, for bounty lands. Other instances may be found, but we mention this as sufficient to establish the fact, that the law discriminates in express terms, so as not to make the mere act of desertion a disqualification to receive bounty money. Whatever may have been the reason in the minds of Congress for making this distinction, we are not permitted to speculate.

The law must be taken as it stands, and it cannot be urged that the intention of the legislature was to do what its silence has left undone. The conclusion, therefore, is inevitable, that so far as acts of Congress are concerned, the matter of desertion did not become a question, and is no disqualification.

In connection with the legislation on this subject, it is proper to notice the provisions of army regulations. We give those which bear upon the question: Paragraph 158, Revised Regulations, 1864, provides, "deserters shall make good the time lost by desertion, unless discharged

by competent authority." Upon this paragraph, it is sufficient to remark, that Kelley made good the time lost by desertion, as the regulations require. (3d finding, Rec., p. 3.)

Paragraph 159 of regulations provides, "no deserter shall be restored to duty without trial, except by competent authority." Upon this paragraph we remark that whether or not Kelley was restored to duty by competent authority without trial, would not seem to affect the question. It is certain he was not tried, and the court cannot deal with him as though a court-martial trial had taken place, and some imaginary sentence been imposed; the fact is, however, that he was restored without trial by competent authority, to wit: the commanding officer of the department. (See Digest Judge Advocate Gen., p. 139, par. 5, 3d ed., 1868.)

Paragraph 61, of regulations provides: "in reckoning the time of service, and the pay and allowances of a deserter he is to be considered as again in the service when delivered up to the proper authority."

Here is an important declaration of the *status* of the soldier upon his being delivered up as a deserter. He is to be regarded thereafter as a soldier of his country liable to perform the duties, and entitled to all the benefits of a soldier. Upon the important points of time of service and pay and allowances, the clear declaration of law is, that the soldier is to be considered as again in the service from the time of his return.

Paragraph 1,358 provides:

"Every deserter shall forfeit all pay and allowances due at the time of desertion. Stoppages and fines shall be paid from his future earnings if he is apprehended and retained in service, and if they are adjudged by a court martial; otherwise from his arrears of pay." In the present case, Kelley had received the bounty due him before he deserted, and what amount of pay, if any was due him, does not appear; but as to bounty there was none due at the time of

desertion, and he forfeited none. The time lost, as we have before seen, he made good to the Government. The paragraph contemplates stoppages and fines from future earnings, as well as from arrears of pay, but in these cases, they must be adjudged by a court martial, which was not convened in Kelley's case. (See Digest, Judge Advocate General, pp. 269, 270.)

Paragraph 1,359, regulations, provides:

"No deserter shall receive pay before trial, or until restored to duty without trial by competent authority to order a trial."

Here again we have by the strongest implication what we found in other portions of the regulations, that where a deserter is restored to duty without trial, his pay shall remain undisturbed.

We have thus presented all of the statute law, and regulations which are also in the nature of statute law, bearing upon the question of forfeiture of pay and allowances as punishment for desertion. No other condition than this which we have noticed can be imposed on a deserter, by the mere operation of law. Anything further than this must be by due legal process; that is by sentence of court martial. In Kelley's case no court martial proceedings were ever instituted, and after his restoration to duty without trial, no such proceedings could have been instituted any more than there could have been a second trial for the same offense. (Digest, p. 139, par. 5.)

Kelley by his desertion, under the operation of the law which we have cited, forfeited all the pay and allowances that were due him at the date of his desertion. Any forfeiture outside of, and beyond this is void, so far as such forfeiture may be based upon law and regulations. Whether bounty is embraced in the term "pay and allowances," is unimportant. If it is so embraced, it cannot be taken away except to the extent we have noticed. If it is

not included within the term "pay and allowances," then there is no law authorizing forfeiture whatever.

We invite the attention of the court at this point, to the opinion of the Judge Advocate General, which we think conclusive of the case. (Digest, pages 72–3, sections 1, 2, 3.)

2. Let us examine the second point.

Does desertion *per se* so taint the status of a soldier as to disqualify him to receive bounty he otherwise could obtain?

If such a taint is thus conveyed into the status of a soldier, it must be by force of some law. We have given reference to all the laws providing for bounty money to soldiers, and deserters are not mentioned directly or indirectly, and we challenge the production of any any statute of the United States which denounces or describes desertion *per se* as imposing a taint or disability to receive bounty. We have also given all the rules and regulations applying to the treatment of such an offense, and no taint or disqualification is by them imposed. If taint or disqualification does not come from any specific law, whence can it come? Does it grow out of the fact that it is made by the Articles of War a capital offense? We answer no. If it did, then every other capital offense denounced by military law would have the same effect; such as *mutiny*, which Hough, an eminent writer on military law, describes as *the most dangerous* crime. *Failure to expose* contemplated mutiny or sedition; striking or offering violence to a superior officer, or disobeying a lawful order; advising or persuading an officer or soldier to desert; being found one mile from camp without written permission; sleeping on post; making known the watchword to those not entitled to it; and various other acts—for the punishment of which see Articles of War and Revised Army Regulations—would also disqualify or taint the soldiers' status.

If desertion, because a capital offense, involves the taint and disability mentioned, then all these others must work the same result. If not, *why* not. But there is not a clause in all the statutes of the country which makes any of these capital offenses *per se* taint or disqualify the offender as to receiving money bounty.

What would be the result of this wholesale injectment of disabilities? Enlistment into service would be so bristling with ignominious disqualifications resting on technical (as well as willful) offenses in which the *locus pœnitentiæ* is wholly taken away, and would be made thereby so forbidding that men could not be found, especially in an emergency calling for great numbers, to undergo the risks and burdens of such a relentless and implacable code of discipline and government. What would be the result in an army of a million of troops called out as troops were during the rebellion, comprising officers and men of inexperienced years, unacquainted with the laws of war, the rigors of discipline, unused to the restraints which capricious or incompetent superior officials could enforce; not schooled, or proof, against the evil influences of depraved associates, and liable under some physical suffering or discouragement, or inadvertance, to commit an offense the gravity of which was not comprehended, the penalty for which had not been understood or appreciated? Is it strange that no law, directly or indirectly, imposes taint for any of these capital offenses?

But further: Desertion *per se* cannot be held to convey taint upon the *status* of soldiers because when not disqualified by express terms of the sentence of a court martial there is no prohibition in law or regulations to *reënlistment* of deserters.

Under all laws and regulations it is to be observed that the deserter is to be considered as occupying the same *status* in the service the day of his return to the proper military custody as he did *before* deserting; and except as

it may be changed by *judicial* proceedings *thereafter*, he is contemplated liable to continuance in the service and to draw pay and allowances the same as though he had not deserted. Whatever may be the result of judicial proceedings in his case, desertion *per se* has not divested him, in the least degree, of liability for or capability of performing all the honorable duties of a soldier; and unless precluded by the sentence of court martial, he is entitled from the day he returns to the regiment *thenceforth* to the same rights, privileges, emoluments, and honors, as though he had never deserted, and at the end of his term, or whenever the Government dispenses with his service as a soldier under his enlistment contract, he is entitled to an honorable discharge. (Digest, Judge Advocate General, pp. 73–4, par. 1.)

3. It is thought that sufficient has been advanced to overcome any pretense that taint or disability grows out of desertion *per se*, and we propose to examine whether any disqualification to receive honorable discharge or bounty grows out of desertion on the ground that it is a violation of contract by the soldier. When a soldier enlists he is subject to the rules, regulations, and laws enacted for the government of the army of the United States. (See tenth article of war.) It is provided by the Rules and Regulations (see paragraph 158, based on act of March 16, 1802,) that deserters shall make good time lost by desertion, unless discharged by competent authority. This is a part of the contract. It is not any part of punishment; it is only saying that if the soldier deserts, and is not excused by authority competent to bring him to trial for it, he shall serve just as many days in addition to the originally measured time before being honorably discharged, as he was absent—that is, he shall render so many days' service before he is entitled to a certificate that he has performed his part of the contract.

If A agrees to work for B one year from 1st of January,

1868, and the written agreement and the law governing it provide that if A does work but eleven months in said year he shall work one month in 1869, and the labor is performed under the last condition, can it be said that A has broken his contract and cannot recover from B the stipulated price for the twelve months?

The Army Regulations (paragraphs 1,357 and 1,358) declare that deserters shall not receive pay and allowances for the time of absence, except satisfactory excuse is given; and shall forfeit all pay and allowances due at date of desertion. These are conditions of the contract; they enter into and make up the conditions of enlistment; with paragraph 158 they embrace all the disabilities, penalties, or obligations under his contract which a soldier returned from desertion is subjected to by the direct operation of law. Whatever else comes upon such a soldier must get life and force from a trial by court martial, and is then confined to that which is expressly adjudged by its sentence to be suffered. If such a court does not expressly declare that he shall forfeit bounty or be dishonorably discharged at the end of his period of service, the same can no more be legally withheld from him because of his desertion than he can be deprived of his personal liberty or his personal property, in addition to, and independent of, the express declarations of the sentence of the court.

But Kelley was not subjected to any trial by court martial, so all the conditions of his contract were satisfied by the application of the regulations of the service as set forth in the paragraphs before mentioned.

Who, then, shall affix a condition to his contract which neither its terms, the law, nor legal proceedings set forth or warrant?

He served the full number of months and days covered by his enlistment, and has fulfilled all obligation, and suffered all disability and restraints imposed by law because of his desertion, and has been honorably discharged

at the expiration of his legal term of service. Whence comes and where rests the right to impose further penalty upon him because of the fact that he at one time committed desertion? But it is the exercise of such a power that brings this case to your consideration, and this power could be exercised with as much right or legal sanction if Kelly had been found one mile from his camp without written permission; or if he had at some time failed to give information of what he might have regarded as idle threats, but which really were the seditious plottings of deprayed and mutinous men; for either offense, or for going to Detroit as he did; he could have been condemned by a court martial to suffer death.

His going to Detroit, viewed in the light of subsequent events, was only a technical desertion; but we will admit, for sake of argument, that he did not intend to return. He did, however, return to his regiment to perform his duty, satisfied all provisions the law applied to his case, and, at the end of the service required of him, received his honorable discharge. What officer of the Government can step in now and decide that there remain obligations which he has not performed under his contract of enlistment before his bounty shall be paid?

Take a broader case. Suppose Kelly had been tried by a court-martial, convicted of desertion, and sentenced to imprisonment for six weeks; that he had fully suffered this punishment, and satisfied the law, received an honorable discharge, and thereupon applied for whatever pay and bounty the law promised a soldier for the period of service he (Kelly) had fulfilled; where and whence is the lawful authority that can refuse, and maintain a refusal, to pay him the monthly wages and the bounty stipulated in the contract under which he served? If bounty can be refused, then monthly wages can be withheld, for the contract covers one as fully as the other, and the law withholds one no more than the other. *Whoever* undertakes to with-

hold one or the other must be able to maintain that *he* is the judge of what is adequate punishment for the crime of which the court-martial convicted Kelly; and that independent of what the law explicitly requires shall be imposed, and what the court, in the exercise of the unlimited discretion given it by the law, awarded as a punishment, *he*, as a judge, can insist on and enforce additional penalties in the shape of fines, forfeitures, and incarceration. We repeat, if bounty can be withheld from Kelly, then his monthly wages could have been; and if his wages could have been, then he could have been deprived of his liberty until the authority which could do all this should be satisfied that Kelly had been sufficiently punished by these *additional* deprivations, notwithstanding the laws *had already declared full and complete satisfaction for the breach of his contract.*

The views we have submitted are but an elaboration (and in some instances we have used the expressions) of the official decisions of the most eminent and able writer on military law this country has ever produced—Judge Advocate General Holt. (Digest, p. 72-3-4-5.)

Having discussed the general questions involved, we invite attention more specifically to the legal foundation of Kelley's claim to bounty.

On the 13th of January, 1864, Congress enacted, "that bounties heretofore paid under regulations and orders from the War Department to men enlisting in the regular or volunteer forces of the United States for three years or during the war, shall continue to be paid from the fifth day of January, 1864, until the first day of March next," &c. (13 Stat., p. 400.)

The war was at its climax. Our army was to succeed only by patriotic response to the call for more troops. Appreciating this and to stimulate enlistments, both in the regular as well as volunteer forces, the War Depart-

ment issued the following instructions to recruiting officers:

[*Circular No.* 15.]

WAR DEPARTMENT,
WASHINGTON, D. C., *February* 6, 1864.

* * * * *

Par. II. "By direction of the Secretary of War, recruiting officers are hereby authorized to enlist and re-enlist all men for the regular army for three years under joint resolution of January 13, 1864."

E. D. TOWNSEND,
Assistant Adjutant General.

Kelly enlisted under the provisions of this circular, February 12, 1864. (Findings 1, Record, p. 3.)

Eight days thereafter, to wit, February 20, 1864, the War Department issued general orders No. 66, prescribing the amount of bounty and the instalments and time of payment, as follows:

"All soldiers enlisted or re-enlisted into the regular army for the period of three years under the provisions of joint resolution of January 13, 1864, and general orders No. 25 of 1864, are entitled to a bounty of $402, to be paid as follows:

On enlistment they shall be paid one month pay in advance	$13 00
First instalment of bounty	25 00
Premium	2 00
Total on enlistment	$40 00
At the first regular pay day after two months service, an additional instalment of bounty will be paid	$50 00

At the first regular pay day after six months service, an additional instalment will be paid.....	50 00
At the first regular pay day after eighteen months service, an additional instalment will be paid...	50 00
At the first regular pay day after two years service, an additional instalment of bounty will be paid.....	50 00
At the first regular pay day after two-and-a-half years service, an additional instalment of bounty will be paid.....	50 00
At the expiration of three years service, the remainder of the bounty will be paid.....	75 00

"By order of the Secretary of War.

E. D. TOWNSEND,
Assistant Adjutant General."

Notwithstanding all efforts to recruit the regular and volunteer army at that time, it was found necessary to further extend the time of enlistments. Congress thereupon, on the 3d March, 1864, passed the following:

"Joint resolution to continue the payments of bounties."

"That the bounties authorized to be paid under existing laws, and by regulations and orders of the War Department, to veterans re-enlisting or persons enlisting in the regular or volunteer service of the United States for three years or during the war, shall continue to be paid from the first day of March, 1864, to the first day of April, 1864, anything in any law or regulation to the contrary notwithstanding, the said bounties to be paid out of any moneys already appropriated for such purposes." (13 Stat., p. 403.)

Here then is the highest legislative sanction for payment of the bounty promised Kelley.

When he deserted, three instalments, to wit, the one payable on enlistment, the one payable after two months service, and the one payable after six months service,

were due and had been paid; no other instalment being then due, there was no bounty affected by his desertion, and to be forfeited on being restored to duty.

Afterwards the several instalments became due, and finally the last one on the expiration of his term of enlistment, but they were withheld from him because he had deserted. We say that the refusal to pay him was wholly unwarranted—as much as to have withheld his pay and allowances, which the Government did not pretend to do.

The laws and orders which we have just quoted, do not even make an honorable discharge requisite to obtain bounty, much less do they warrant the Government in breaking faith with the soldier, who has fully met every requirement of the law and regulations, and has received an honorable discharge in common with his comrades, who have done no more than he, but with whom the Government has kept faith.

There was a time when Congress felt the weight of obligation due from the country to its defenders, and it is to be regretted that this sentiment did not extend further. On the day the last act referred to passed, to wit: March 3, 1864, Congress passed the following Joint Resolution of thanks to the soldiers who enlisted in the army:

"That the thanks of Congress are hereby given to those noble and brave men, who, having already so gallantly endured the hardships and perils of war, for more than two years, in support of their country's flag present the sublime spectacle of again voluntarily enrolling themselves in the army of the Union for another three years campaign, or so long as the war shall continue.

SEC. 2. That the Secretary of War cause these resolutions to be read to each of the veteran regiments, who have reënlisted, or shall reënlist, in both the volunteer and regular forces of the United States."

This resolution is important as showing how universal

must have been the feeling that upon prompt levies to fill our broken ranks hung the fate of the nation.

We have already fully stated the points on which we rely. We find in the Digest of Opinion of the Judge Advocate General above cited, page 146, paragraph 7, title "Discharge," as follows: "Where a deserter, noted as such in the usual manner at the time, on the rolls of his company, was restored to duty without trial, and, at the end of his proper time was granted an honorable discharge, *held* that such discharge was a formal judgment, passed by the Government upon the entire military record of the soldier, and an authorative declaration by it, that he left the service in a status of honor; that as such it dispensed altogether with the supposed necessity (in order that the soldier might obtain bounty) of a removal, by order, of the charge of desertion from the rolls, and amounted of itself to the removal of any charge or impediment in the way of his receiving such bounty."

We think this view wise, humane, patriotic, just, and strictly legal. If the soldier's final discharge carries with it no sancity; if its holder cannot regard it as declaring the true relation subsisting between him and his country when he ceased serving it; if the hasty, informal, and often false entry of absence without leave found on the rolls of his first month's service wipes out all the honor of his subsequent years of toil, suffering, and danger, and renders false his final honorable discharge, where is the citizen to be found with love of country strong enough to brave the dangers of battle and ultimate ignominy which such a view would seem to make probable?

This whole subject in all its bearings is fully and ably discussed by the Judge Advocate General in his Digest of Opinions, third edition, 1868, under title "Bounty" (p. 68 to 76 inclusive), already cited. We invite its careful reading by the court. The earlier editions do not give this.

We add the following:

1. Where a discharge is not in express terms dishonorable, it must be held to be honorable. (Ibid, title "Discharge," p. 144.)

2. The discharge in Kelly's case is in the form found in the Army Regulations, and the findings are, that it was an honorable discharge. (See various editions and revisions.)

3. "Pay" has a technical definition, and does not extend even to "allowances." (Ibid, title "Pay and Allowances," p. 264.) *A fortiori* does it not extend to bounty.

4. "Allowances" is a term used in a technical sense throughout the statutes, and covers clothing, rations, various commutations not strictly within the meaning of pay proper.

We think this disposes of all the questions in the case. No one can examine the careful and elaborate opinions of the Judge Advocate General, cited above, without being fully convinced of the justice underlying our case. Desertion is an ugly word, as willful desertion is an ugly crime. But thousands have died gallantly, and other thousands have been discharged honorably, little dreaming that here, where the record of their heroic deeds remains, is kept hidden from sight some evidence of dereliction to hound them, or their widows, when claiming the hard earnings of years of toil and danger; while other military offences, equally heinous in the eye of the articles of war, have long since been forgotten, and are remembered no more forever.

We think it wrong to attempt a wholesale proscription of soldiers who can no longer defend themselves, the offences of most of whom were venial, and long ago condoned, or the penalty paid, and who are now powerless to efface the stigma bruited against them.

The bounties due soldiers were deemed a sacred debt,

and by the fourteenth amendment to the Constitution, this debt is placed beyond question. When this amendment was adopted, it was to prevent repudiation by rebels when returning to power. We think it strong enough, and broad enough, to secure bounties even against departmental construction.

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